

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 15-08

GENERAL MOTORS LLC

Complainant,

v.

**NIPPON YUSEN KABUSHIKI KAISHA;
WALLENIUS WILHELMSEN LOGISTICS AS; and
EUKOR CAR CARRIERS INC.**

Respondent.

**JOINT MOTION AND MEMORANDUM FOR APPROVAL
OF SETTLEMENT AGREEMENT, DISMISSAL WITH PREJUDICE
OF THE COMPLAINT AGAINST NIPPON YUSEN KABUSHIKI KAISHA,
AND TREATMENT OF SETTLEMENT AGREEMENT AS CONFIDENTIAL**

I. INTRODUCTION

Pursuant to Federal Maritime Commission Rules of Practice and Procedure 72, 91, and 5, 46 C.F.R. §§ 502.72, 502.91, and 502.5, Complainant General Motors LLC (“GM”) and specially appearing Respondent Nippon Yusen Kabushiki Kaisha (“NYK Line”) (collectively, GM and NYK Line are the “Settling Parties”) jointly move for: (1) approval of the Confidential Settlement Agreement (the “Settlement Agreement”); (2) dismissal of the Complaint against NYK with prejudice; and (3) an order that the Settlement Agreement be held confidentially by the Presiding Judge and the Commission and barred from public view or disclosure.

The Settlement Agreement is separately filed under seal as **CONFIDENTIAL EXHIBIT “A.”** A Joint Motion to Seal Confidential Settlement Agreement is filed concurrently.

II. STATEMENT OF FACTS

GM commenced this proceeding by filing its Complaint on September 2, 2015. The Settling Parties and specially appearing (but since dismissed) Respondents Wallenius Wilhelmsen Logistics AS (“WWL”) and EUKOR Car Carriers Inc. (“EUKOR”)¹ jointly moved for a stay pending a ruling in the U.S. District Court for the District of New Jersey as to whether the prior dismissal of certain class action cases applies to GM’s complaint filed in *General Motors LLC v. Nippon Yusen Kabushiki Kaisha et al.*, MDL No. 2471, Case No. 15-cv-04739-ES-JAS (D.N.J.). The Presiding Judge granted the requested stay on January 5, 2016.

In the interim, the Settling Parties engaged in good-faith and arms-length settlement negotiations in light of the anticipated substantial costs of continued litigation and the uncertainties inherent in the outcome of complex litigation. Specifically, the Settling Parties concluded that each stands to face the substantial costs of further litigation associated with voluminous documentary discovery, numerous depositions, expert discovery related to GM’s alleged damages, briefing of complex issues of law, a trial of disputed facts, and appeals. Consequently, the Settling Parties have entered into the Settlement Agreement. The Settlement Agreement was negotiated and entered into after good-faith negotiations and with the benefit of legal counsel.

¹ On July 25, 2016, GM, WWL, and EUKOR filed a Joint Motion and Memorandum for Approval of Settlement Agreement, Dismissal with Prejudice of the Complaint Against Wallenius Wilhelmsen Logistics AS and EUKOR Car Carriers, Inc., and Treatment of Settlement Agreement as Confidential. The Commission granted that motion on July 29, 2016. *General Motors v. Nippon Yusen Kabushiki Kaisha et al.*, No. 15-08, 2016 WL 4157600 at *3 (A.L.J. July 29, 2016).

On September 2, 2016, GM filed a voluntary dismissal with prejudice pursuant to *Fed. R. Civ. P.* 41(a) of all of its claims pending in the U.S. District Court against NYK; a true and correct copy of that notice of voluntary dismissal with prejudice is attached hereto as **EXHIBIT “B”** and is made a part hereof by reference.

III. ARGUMENT

A. The motion to approve the Settlement Agreement and dismiss the complaint against NYK with prejudice should be granted.

The motion to approve the Settlement Agreement and dismiss the above-captioned proceeding with prejudice as to NYK should be granted. It is “well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid.” *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1092 (A.L.J. 1978); accord *American Stevedoring, Inc. v. The Port Authority of New York and New Jersey*, No. 10-05, 2011 WL 7144009, *1 (ALJ Oct. 27, 2011) (Notice Not to Review served Dec. 2, 2011); *Smartstone Private Limited v. General Noli USA, Inc.*, No. 1946(F), 2015 WL 4537579, *2 (A.L.J. July 22, 2015) (same) (Notice Not to Review Served Aug. 24, 2015); *General Motors v. Nippon Yusen Kabushiki Kaisha et al.*, No. 15-08, 2016 WL 4157600 at *2 (A.L.J. July 29, 2016). The Commission finds settlements especially supportable when the parties are confronted with the prospect of expensive further litigation and uncertainty as to the outcome. *Celanese Corp. v. The Prudential Steamship Co.*, 20 S.R.R. 27, 30 (A.L.J. 1980). That is because “[r]eaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation.” *Smartstone*, No. 1946(F), 2015 WL 4537579 at *3 (quoting *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R.

623, 626 (F.M.C. 2009)). Nonetheless, the Commission does not approve settlement agreements if the agreement would violate the law or policy, or is infected by fraud, duress, undue influence, mistake, or other defects. *Id.* at *2; *Old Ben Coal*, 18 S.R.R. at 1093.

The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Consequently, the Settling Parties respectfully request that the Settlement Agreement be approved and that all of GM’s claims against NYK in the above-captioned proceeding be dismissed with prejudice. Because NYK is the last remaining party in this action, the Settling Parties similarly request that this action be terminated in full and be administratively closed.

B. The Settling Parties request that the Settlement Agreement be treated as confidential.

The Settling Parties also request that the Settlement Agreement be held confidentially by the Commission. Parties may request confidentiality of a document under Commission Rule 5. 46 C.F.R. § 502.5. As the Commission has held, “[i]f parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests.” *Smartstone*, No. 1946(F), 2015 WL 4537579 at *3; *American Stevedoring*, 2011 WL 7144009 at *2 (quoting *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, No. 00-04, 2000 WL 1920488, *3 n.7 (ALJ Sep. 15, 2000)); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc. and Ignacio Gomez*, 29 S.R.R. 227, 227-29 (ID

2001); *Marine Dynamics v. RTM Line, Ltd.*, 277 S.R.R. 503, 504 (ID 1996); *General Motors*, 2016 WL 4157600 at *3.

Under the terms of the Settlement Agreement, the Settling Parties must keep the terms of the Settlement Agreement confidential. This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality. The Settling Parties therefore respectfully request that the Commission keep the unredacted copy of the Settlement Agreement confidential. Because the entire Settlement Agreement is confidential, the Settling Parties have not filed a public version of the Settlement Agreement. Commission precedent provides that settling parties need not file a public version of a settlement in such circumstances. *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, No. 13-07, 2015 WL 1928868, at *6 (FMC Apr. 14, 2015) (concluding that parties had complied with FMC Rule 5 even though “[n]o public version of the Agreement has been filed, as the parties seek to have the entire Agreement treated confidentially”); *General Motors*, 2016 WL 4157600 at *3-*4. Where, as here, the Settling Parties “want to maintain confidentiality of the Settlement Agreement as it contains terms setting out the settlement amount, as well as terms governing the release of all claims related to the controversy involved” and there is no “public interest in disclosure of the settlement amount or the terms of the release of the involved claims, that outweighs the Parties’ interest in maintaining the confidentiality of these terms,” the agreement should be held confidentially. *Id.* at *7.


IV. CONCLUSION

For the reasons above, the Settling Parties respectfully request that (1) the Presiding Judge approve the Settlement Agreement; (2) that Nippon Yusen Kabushiki Kaisha be dismissed

with prejudice, thus terminating the action in full; and (3) the Settlement Agreement be treated as confidential.

Dated: September 12, 2016

Respectfully submitted,

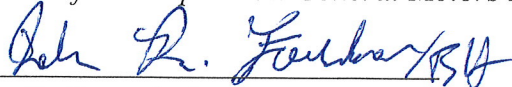


Daniel A. Sasse
Chahira Solh
Ryan C. Wong
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, California 92614
Telephone: (949) 263-8400
Facsimile: (949) 263-8414
E-mail: dsasse@crowell.com
csolh@crowell.com
rwong@crowell.com

Kent A. Gardiner
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
E-mail: kgardiner@crowell.com

Deana E. Rose
MANELLI SELTER PLLC
1725 I Street, NW, Suite 300
Washington, D.C. 20006
Telephone: (202) 261-1000
Facsimile: (202) 887-0336
E-mail: drose@mdslaw.com

Counsel for Complainant General Motors LLC



John R. Fornaciari
Robert M. Disch
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W., Suite 1100
Washington, D.C. 20036
Telephone: (202) 861-1612

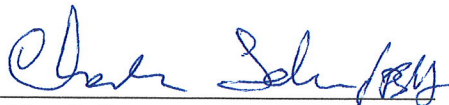
Facsimile: (202) 861-1783
E-mail: jfornaciari@bakerlaw.com

*Counsel for Specially Appearing Respondent
Nippon Yusen Kabushiki Kaisha*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all parties of record by electronic mail, and submitted a copy via U.S. mail to each such person.

DATED: September 12, 2016



Chahira Solh
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614
Telephone: (949) 263-8400
Facsimile: (949) 263-8414
E-mail: csolh@crowell.com

Counsel for Complainant General Motors LLC